

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

ROBERT J. MATIJAS, Ind.
& d/b/a Ponderosa Farms

CASE NO. 88-00794

Debtor

Chapter 12

APPEARANCES:

PELLAND & SHOCKEY, ESQS.
Attorneys for Debtor
500 S. Warren Street
Syracuse, New York 13202

DAVID W. PELLAND, ESQ.
Of Counsel

RICHARD CROAK, ESQ.
Office of U.S. Trustee
10 Broad Street
Utica, New York 13501

ROBERT E. LITTLEFIELD, JR., ESQ.
Chapter 12 Trustee
350 Northern Boulevard
Albany, New York 12204

STEPHEN D. GERLING, U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

The Court has before it the motion of David W. Pelland, Esq., of counsel to Pelland & Shockey, Esqs. ("Pelland") seeking compensation for services rendered to the Debtor in connection with his voluntary petition filed pursuant to Chapter 12 of the Bankruptcy Code (11 U.S.C. §§101-330) ("Code") on May 23, 1988.

The motion appeared on the Court's calendar at Syracuse, New York on April 16, 1991

and was thereafter adjourned from time to time until May 21, 1991, after which it was submitted for decision.

On April 11, 1991, the United States Trustee ("UST") filed an Amended Statement regarding Pelland's motion in which it noted that Pelland had never been appointed to act as the Debtor's counsel pursuant to Code §327 and that all compensation should be deferred until Pelland had submitted an application for appointment.

On May 24, 1991, Pelland filed an Application seeking appointment nunc pro tunc. Pelland contends that it has not been the practice of the firm to seek appointment in Chapter 12 cases due to a "misunderstanding that such an appointment was not necessary." (See Affidavit of David W. Pelland sworn to April 13, 1991).

Pelland contends that in spite of its lack of appointment, it has nevertheless represented the Debtor throughout the Chapter 12 case, that Debtor's Chapter 12 plan was confirmed and "all payments made to creditors as proposed and there are additional monies available to pay said attorneys." Id.

Neither the UST nor the Chapter 12 Trustee dispute the allegations set forth in the May 24th Application.

DISCUSSION

It is this Court's position that reference to Chapter 12 in Code §327(b), when read together with Code §§327(a) and 330(a), requires the prior court appointment of an attorney for the debtor if that attorney's services are to be compensable from the estate. See Matter of Slack, 73 B.R. 382 (Bankr. W.D.Mo. 1987); In re Stacy Farms, 78 B.R. 494 (Bankr. S.D.Ohio 1987); In re Samford,

102 B.R. 724 (Bankr. E.D.Mo. 1989).

Though Pelland initially argued that appointment pursuant to Code §327 has no application to a Chapter 12 case, and that in fact it had never been required to obtain appointment in prior Chapter 12 cases, it now appears that Pelland acknowledges the need for appointment, contends that its failure to obtain appointment was due to a misunderstanding and seeks nunc pro tunc appointment in order to gain approval of the fee request.

In considering appointment of a professional on a nunc pro tunc basis, courts have generally utilized two criteria, the first being whether or not the applicant satisfies the disinterestedness requirement of Code §327 and would have been appointed initially and second, a finding of circumstances so extraordinary as to warrant retroactive approval. See F/S Airlease II, Inc. vs. Simon, 844 F.2d 99 (3d Cir. 1988) cert. den. 109 S.Ct. 137; In re Indian River Homes, Inc., 108 B.R. 46 (D.Del. 1989); In re Rusty Jones, Inc., 109 B.R. 838 (Bankr. N.D.Ill. 1989); In re Sinor, 87 B.R. 620 (Bankr. E.D.Cal. 1988).

In the instant case, it is apparent that the first requirement has been met as there appears to be no barrier to Pelland's appointment as Debtor's counsel had the necessary application been made pursuant to Code §327 and Federal Rule of Bankruptcy Procedure 2014.

It is the second criteria that is more troublesome, as that criteria has spawned certain sub-factors such as, "whether the applicant or some other person bore responsibility for applying for approval; whether the applicant was under time pressure to begin service without approval; the amount of delay after the applicant learned that initial approval had not been granted; the extent to which compensation to the applicant will prejudice innocent third parties; and other relevant factors." F/S Airlease II, Inc. v. Simon, supra 844 F.2d at 105-106.

Here, Pelland does not contend that anyone else bore the responsibility for its

appointment, nor does it allege any time pressure. Consideration of delay after becoming aware of the need for appointment is not a factor, since it appears that the case has been fully administered and is ready to be closed.

The final sub-factor can be resolved in Pelland's favor as it appears that all creditors have been paid in full and thus, payment of a fee to Pelland at this juncture will in no way adversely impact on unsecured creditors.

Benefit to the estate is not, standing alone, a sufficient basis upon which to predicate a nunc pro tunc appointment. See In re Mason, 66 B.R. 297 (Bankr. D.N.J. 1986). However, benefit to the estate coupled with a lack of any adverse impact to unsecured creditors in the form of a reduced dividend, is in the Court's opinion, a sufficient basis to find extraordinary circumstances supporting nunc pro tunc appointment.

Pelland's motion seeks approval of a fee of \$2,500.00, which it contends is less than that computed on an hourly basis, but which, nevertheless, was agreed upon with the Debtor, together with a reimbursement of \$336.02 in expenses. The Court has reviewed the fee application and finds the contemporaneous time records to be supportive of the request.

Based upon the foregoing, it is

ORDERED, that the Debtor Robert J. Matijas be and he hereby is authorized to employ Pelland effective May 23, 1988 to represent the Debtor for purposes of this Chapter 12 proceeding, and it is further

ORDERED that Pelland be awarded an additional fee of \$2,500.00 for services rendered to the Debtor for the period May 23, 1988 through November 27, 1990, and receive reimbursement of expenses in the sum of \$336.02, and it is further

ORDERED that the Chapter 12 Trustee shall disburse said fee and expenses to

Pelland within twenty (20) days of the date of entry of this Order.

Dated at Utica, New York

this day of August, 1991

STEPHEN D. GERLING
U.S. Bankruptcy Judge